SURUHANJAYA PERKHIDMATAN AWAM v. HJH MARINA HJ MUSTAFA

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
ROHANA YUSUF JCA
TENGKU MAIMUN TUAN MAT JCA
[CIVIL APPEAL NO: M-01-502-2011]
26 JANUARY 2015

ADMINISTRATIVE LAW: *Disciplinary proceedings – Public officer – Reduction in rank – Right to be heard – Failure to grant oral hearing – Whether contravened art. 135(2), Federal Constitution – Whether respondent's representation complete without oral hearing*

CONSTITUTIONAL LAW: *Constitution – Federal Constitution, art. 135(2) – Request for oral hearing – Failure to grant – Whether contravened art. 135(2) – Whether right to reasonable opportunity of being heard under art. 135(2) synonymous with right to oral hearing*

The respondent, a 'Pegawai Tadbir dan Diplomatik Gred M44', was found to have breached reg. 4(2)(g) of the Public Officers (Conduct and Discipline) Regulations 1993 ('1993 Regulations'). A show cause letter was issued to inform the respondent that the appellant decided to pursue disciplinary action against her pursuant to reg. 35 of the 1993 Regulations with a view of dismissal or reduction in rank. The respondent's representation was given under a cover letter whereby she requested for an oral preliminary hearing. However, without affording an oral hearing, the respondent was demoted in rank from Grade M44 to Grade M41. Dissatisfied, the respondent filed an application for judicial review in the High Court to set aside the decision of the appellant. Referring to art. 135(2) of the Federal Constitution, the High Court Judge allowed the respondent's application and held that an oral hearing ought to have been granted. Hence, the appellant appealed.

Held (allowing appeal)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The right to a reasonable opportunity of being heard under art. 135(2) of the Federal Constitution is not synonymous with a right to an oral hearing, which should be granted according to the circumstances of the case. The right to be heard as enshrined under art. 135(2) does not, in all cases, include the duty to afford an oral hearing (*Najar Singh v. Government of Malaysia*; refd). (paras 7 & 8)

(2) The majority in *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* accepted that *Ang Seng Wan v. Suruhanjaya Polis DiRaja Malaysia & Anor* and *Mat Ghaffar Baba v. Ketua Polis Negara & Anor* laid down the principle

A and the clear situation as to when the disciplinary committee should convene an oral hearing. On the facts, this court had perused the respondent's representation to appreciate as to why an oral preliminary hearing was needed. However, no reasons were set out to form any basis for the request in the cover letter for an oral preliminary hearing. B Further, no basis was demonstrated for the necessity of a preliminary oral hearing in order to complete her representations over and above what she had put in writing. (paras 13, 15 & 16)

Bahasa Malaysia *Translation Of Headnotes*

C Responden, seorang Pegawai Tadbir dan Diplomatik Gred M44, telah didapati melanggar peraturan 4(2)(g) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturan 1993'). Satu surat tunjuk sebab telah dikeluarkan untuk memaklumkan responden bahawa perayu akan mengambil tindakan tatatertib terhadapnya berikutan per. 35 Peraturan-Peraturan 1993 untuk dibuang kerja atau diturunkan pangkat. D Representasi responden diberikan di bawah satu surat iringan di mana beliau telah memohon untuk satu pendengaran lisan awalan. Walau bagaimanapun, tanpa mengadakan pendengaran lisan, responden telah diturunkan pangkat daripada Gred M44 kepada Gred M41. Tidak berpuas hati, responden telah memfailkan permohonan untuk semakan kehakiman di Mahkamah Tinggi E untuk mengenepikan keputusan perayu. Merujuk kepada per. 135(2) Perlembagaan Persekutuan, Hakim Mahkamah Tinggi telah membenarkan permohonan responden dan memutuskan bahawa pendengaran lisan sepatutnya dibenarkan. Oleh itu, perayu merayu.

Diputuskan (membenarkan rayuan)

F **Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:**

(1) Hak peluang yang munasabah untuk didengar di bawah per. 135(2) Perlembagaan Persekutuan tidak sama seperti hak untuk pendengaran lisan, yang dibenarkan berdasarkan keadaan sesuatu kes. Hak untuk G didengar seperti yang diperuntukkan di bawah per. 135(2) tidak, dalam semua kes, merangkumi kewajipan untuk membenarkan pendengaran lisan (*Najar Singh v. Government of Malaysia*; dirujuk).

(2) Majoriti dalam kes *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* H menerima bahawa *Ang Seng Wan v. Suruhanjaya Polis DiRaja Malaysia & Anor* dan *Mat Ghaffar Baba v. Ketua Polis Negara & Anor* telah menetapkan prinsip dan keadaan di mana jawatankuasa tatatertib boleh mengadakan pendengaran lisan. Berdasarkan fakta, mahkamah ini telah meneliti representasi responden untuk menilai sebab keperluan suatu pendengaran lisan awalan. Walau bagaimanapun, tiada alasan diperolehi I daripada surat iringan untuk membentuk sebarang asas bagi permohonan

pendengaran lisan awalan. Tambahan lagi, tiada alasan ditunjukkan untuk keperluan pendengaran lisan awalan supaya representasinya disempurnakan melampaui apa yang dinyatakan secara bertulis.

Case(s) referred to:

Ang Seng Wan v. Suruhanjaya Polis DiRaja Malaysia & Anor [2002] 1 CLJ 493 CA ***(refd)***

Mat Ghaffar Baba v. Ketua Polis Negara & Anor [2008] 1 CLJ 773 CA ***(refd)***

Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor [2012] 1 CLJ 448 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 135(2)

Public Officers (Conduct and Discipline) (Chamber D) General Orders 1980, O. 26(5)

Public Officers (Conduct and Discipline) Regulations 1993, regs. 4(2)(g), 35

For the appellant - Shamsul Bolhassan (Aida Adhha Abu Bakar with him); AG's Chambers

For the respondent - Avatar Singh; M/s Mohd Latip & Assocs

[Editor's note: Appeal from High Court, Melaka; Application of Judicial Review No: 13-5-2010 (overruled).]

Reported by Kumitha Abd Majid

JUDGMENT

Abdul Wahab Patail JCA:

[1] The appellant Suruhanjaya Perkhidmatan Awam appealed against the decision of the High Court to allow the application for judicial review by the respondent Hajah Marina binti Haji Mustafa, and thereby setting aside the decision of the appellant.

[2] The appeal centred upon the right to be heard as enshrined in art. 135 of the Federal Constitution on restriction on dismissal and reduction in rank as follows:

> (1) No member of any of the services mentioned in paragraphs (b) to (h) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank:
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> Provided that in its application to members of the services mentioned in paragraph (g) of Clause (1) of Article 132 this Clause shall not apply to any law which the legislature of any State, other than Penang and Malacca, may make to provide that all powers and functions of a Public Service Commission of such State, other than the power of first appointment to the permanent or pensionable establishment, be exercised by a Board appointed by the Ruler of such State:

A And provided further that this Clause shall not apply to a case where a member of any of the services mentioned in this Clause is dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a Commission to which this Part applies, and this proviso shall be deemed to have been an integral part of this Clause as from Merdeka Day.

B (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

Provided that this clause shall not apply to the following cases:

C (a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or

(b) where the authority empowered to dismiss or reduce in rank a member of such a service is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable D to carry out the requirements of this Clause; or

(c) where the Yang di-Pertuan Agong, or, in the case of a member of the public service of a State, the Ruler or Yang di-Pertua Negeri of that State, is satisfied that in the interests of the security of the Federation or any part thereof it is not expedient to carry out the E requirements of this Clause; or

(d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under F any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls:

Provided further that for the purpose of this Article, where the service of G a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di-Pertuan Agong under Clause (2) of Article 132, such termination of service shall not constitute dismissal whether or not the decision to terminate the service is connected with the misconduct of or unsatisfactory performance of duty by such member in relation to his H office or the consequences of the termination involved an element of punishment; and this proviso shall be deemed to have been an integral part of this Article as from Merdeka Day.

(3) No member of any of the services mentioned in paragraph (c), (f) or (g) of Clause (1) of Article 132 shall, without the concurrence of the Judicial and I Legal Service Commission, be dismissed or reduced in rank or suffer any other disciplinary measure for anything done or omitted by him in the exercise of a judicial function conferred on him by law.

[3] In this case, the respondent, a "Pegawai Tadbir dan Diplomatik Gred M44" was found under two charges to have breached reg. 4(2)(g) Public Officers (Conduct and Discipline) Regulations 1993 and accordingly was demoted from Gred M44 to Gred M41.

[4] As summed up by the High Court, the four issues raised were whether:

(a) the respondent had been given a fair hearing in accordance with art. 135(2) of the Federal Constitution;

(b) the appellant failed to act reasonably;

(c) the appellant had examined and considered accurately the respondent's representation;

(d) the decision of the appellant was fair, just and not *ultra vires*.

[5] In its grounds of judgment and referring to art. 135(2), the High Court stated that the respondent's application was allowed for the reason:

> ... memandangkan terdapatnya kegagalan Responden untuk memberi hak kepada Pemohon untuk pendengaran lisan sebelum membuat keputusan walaupun Pemohon telah meminta untuk satu pendengaran secara lisan diadakan untuk isu-isu yang dibangkitkan di dalam representasi yang dibuat oleh Pemohon.

[6] According to the grounds of judgment, the High Court had referred itself to various cases including *Mat Ghaffar Baba v. Ketua Polis Negara & Anor* [2008] 1 CLJ 773 CA.

[7] In *Mat Ghaffar Baba v. Ketua Polis Negara & Anor* (*supra*), the appellant had requested that in the event that his explanation is deemed insufficient to exculpate himself from those charges he prayed that an oral hearing be given to him to enable him to cross-examine all witnesses that had implicated him in the alleged wrong doings and further he requested for all evidence/proof be made available to him in view of the seriousness of the charges and the penalty that may follow. It was held that:

> [12] It is settled principle that the right to be heard as enshrined in Art. 135 (2) of the Federal Constitution does not in all cases include the duty to afford an oral hearing. (See *Najar Singh v. Government of Malaysia* [1976] 1 LNS 81; [1976] MLJ 203; *Ghazi b Mohd Sawi v. Mohd Haniff b. Omar* [1994] 2 CLJ 333; *Raja Abdul Malek Muzaffar Shah b. Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619. But as stated by Gopal Sri Ram, JCA in *Raja Abdul Malek Muzaffar Shah* (*supra*):
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> > Nevertheless, the principle that the right to be heard is non-inclusive of a duty to afford an oral hearing does not mean that the failure or refusal to afford such a hearing would render the decision reached safe and harmless from attack. Cases may arise where, in the light of peculiar facts, the failure to afford an oral

A hearing may result in the decision arrived at being declared a nullity or quashed. (See *R v. Immigration Appeal Tribunal* [1977] 1 WLR 795).

The categories of procedural fairness are not closed and the procedure adopted in a particular case may be fair or otherwise B according to its own facts. The measure of fairness afforded to a particular plaintiff is a question of fact and of degree that is to be judged according to our own standards and values and not according to the standards and values of foreign judge, however eminent. That is not to say that we cannot obtain valuable assistance from other sources; but in the final analysis it is a C question that is to be decided according to the Malaysian concept of fairness.

[13] That is the embodiment of the doctrine of procedural fairness.

[14] In *Raja Abdul Malek Muzaffar Shah* one of the complaints was that he was not afforded an oral hearing by the disciplinary authority. On the D facts of that case this court came to its finding that there was no departure from the procedural fairness by the disciplinary authority as the charges were well drafted and care was taken to ensure that full particulars were provided. However, the appeal was allowed on other ground which does not concern us here.

E ...

[26] In the circumstances, after considering the charges levelled against the plaintiff, we are of the view that in all fairness the plaintiff ought to have been given an oral hearing as requested by him. Similarly documentary and other evidence purportedly relied upon by the first F defendant in arriving at his finding ought to have been made available to him to enable the plaintiff to make an effective and meaningful defence to the charges. In the circumstances we agree with the plaintiff's counsel that there had been a clear breach of the rules of natural justice as embodied in Art. 135(2) of the Federal Constitution which renders the disciplinary proceedings null and void. In this regard we are reminded of G the observation made by L. Denning in *B. Surinder Singh Kanda v. The Government of The Federation of Malaya* [1962] 1 LNS 14; [1962] 28 MLJ 169, at the p. 172 which reads:

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been H given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L.C. in *Board of Education v. Rice* [1911] AC 179, 182; 27 TLR 378) down to the decision of their Lordships Board in *Ceylon University v. Fernando* [1960] 1 WLR 223; [1960] 1 All ER I 631, PC).

[8] It is clear that the right under art. 135(2) to a reasonable opportunity of being heard is not synonymous with a right to an oral hearing, which should be granted according to the circumstances of the case.

[9] In *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448 FC, the Federal Court by majority decision held:

> [25] It is my considered view that the cases of *Ang Seng Wan* and *Mat Ghaffar* have laid down the principle and the clear situation as to when the Disciplinary Committee should convene an oral hearing. The position would be that when there is a request by the public officer for an oral hearing after he had denied all the charges and appears to have exculpated himself by furnishing credible evidence in his representation letter, then by virtue of O. 26(5) of the General Orders 1980, the officer should be afforded an oral hearing to satisfy the requirement of Art. 135(2) of the Federal Constitution which states that a reasonable opportunity of being heard be given before any member of such a service could be dismissed or reduced in rank. It would become all the more necessary for the oral hearing or enquiry to be held if there is no evidence to contradict the public officer's exculpatory statement. On this point it is to be stated that oral hearing should be granted when there is a request and when the Disciplinary Committee is faced with two (2) sets of facts, documents and evidence, that is, the investigation report from the Investigating Authority and that of the officer's representation letter which is exculpatory in nature. A Disciplinary Committee can only come to a fair conclusion between these two (2) versions upon hearing further evidence.

[10] The words used, that "... the officer should be afforded an oral hearing to satisfy the requirement of art. 135(2) ..." warrant attention for the reason that the words "should be" were used rather than "must be".

[11] We observed further that art. 135(2) speaks of being given a reasonable opportunity of being heard, but did not specify it must be an oral hearing.

[12] Furthermore, O. 26(5) of the General Orders 1980 referred to, provided only as follows:

> (5) Where the Appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.

[13] It is clear that the majority accepted that *Ang Seng Wan v. Suruhanjaya Polis DiRaja Malaysia & Anor* [2002] 1 CLJ 493 and *Mat Ghaffar* have laid down the principle and the clear situation as to when the Disciplinary

Committee should convene an oral hearing. Therefore, since O. 26(5) refers to a case where the Appropriate Disciplinary Authority considered that the case against the officer requires further clarification, it does not support the reasoning that "... by virtue of O. 26(5) of the General Orders 1980, the officer should be afforded an oral hearing to satisfy the requirement of art. 135(2)". Except in cases where representations having been made, the Appropriate Disciplinary Authority considered further clarification to be necessary. Then, obviously to give opportunity for the officer to find out what the further clarification is that was necessary and the reasons why before he answers it, an oral hearing at that stage would expedite matters and was therefore warranted.

[14] In this case, the appellant had issued a show cause letter dated 17 August 2009 to inform the respondent that the appellant had decided to pursue disciplinary action pursuant to reg. 35 of the Public Officers (Conduct and Discipline) Regulations 1993 against her with a view to dismissal or reduction in rank, the two grounds relied upon and that the respondent was given 21 days to submit her written representation to exculpate herself. Her representation was given under a cover letter dated 7 September 2009 where she stated:

> 2. Bersama-sama ini dikemukakan representasi saya yang mengandungi alasan untuk membebaskan diri saya daripada diambil tindakan tatatertib dengan tujuan buang kerja atau turun pangkat.
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> 3. Memandangkan isu-isu dan fakta-fakta adalah serius dalam kes ini dan perlu diteliti sebelum menerima pakai laporan BPR (Badan Pencegah Rasuah) dan kenyataan serta keterangan, maka saya mohon diadakan Pemeriksaan Lisan Awal (Oral Preliminary Hearing). Saya juga mohon senarai nama saksi untuk keperluan saya.

[15] We perused her 50 pages representation to appreciate as to why an oral preliminary hearing was needed. It was very detailed and specific. We found no reasons set out to form any basis for the request in the cover letter for an oral preliminary hearing. Instead, her representation simply concluded as follows:

> 27. Maka dengan itu saya memohon dan merayu dengan sesungguh hati kepada pihak tuan agar mempertimbangkan alasan-alasan yang telah saya nyatakan bagi menyangkal segala pertuduhan terhadap saya. Dan saya memohon tiada tindakan tatatertib diambil ke atas saya seterusnya. Semoga pertimbangan yang seadil-adilnya akan dibuat terhadap saya selaras dengan rayuan saya dan fakta yang saya kemukakan di atas ini.

[16] We concluded that no basis was demonstrated for the necessity for a preliminary oral hearing in order to complete her representations over and above what she had put in writing.

[17] Returning to the grounds of judgment of the High Court, we found no reason set out as to why the High Court came to the conclusion that the circumstances of the case were such that an oral hearing should have been given.

[18] We, therefore, concluded that the High Court had no reasons why an oral hearing should be granted as requested, and that it had erred in allowing the respondent's application for judicial review on the ground that an oral hearing ought to have been granted. We allowed the appeal with no order as to costs.